U.S. Department of Labor

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In the Matter of

WILLIAM G. PRICE,
Claimant,

v.

METROPOLITAN STEVEDORE CO., **CRESCENT WHARF &WAREHOUSE CO.**, (aka **STEVEDORING SERVICES OF AMERICA**), **MARINE TERMINALS CORP.**,**CRESCENT CITY MARINE WAYS & DRY DOCK CO.**, and **PASHA MARITIME SERVICES**,
Employers ,

and

HOMEPORT INSURANCE CO., **SAIF CORP.**, and **STATE COMPENSATION INSURANCE FUND**,
Insurers,

and

DIRECTOR, OWCP,
Party-in-Interest.

June 16, 2000

CASE NO. 1999-LHC-2826
1999-LHC-2827

OWCP NO.18-60144
18-63849

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Before: **Paul A. Mapes**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. §901 et seq. A trial on the merits of the claim was held in San Diego, California, on March 22, 2000. The claimant and all the above-captioned employers and the insurers were represented by counsel, but no one appeared on behalf of the

Director of the Office of Workers' Compensation Programs (hereinafter, "the Director"). During the trial, the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1-27, Crescent Wharf & Warehouse Co. and Homeport Insurance Company Exhibits (SSAX) 1-12, Crescent City Marine Ways and SAIF Exhibits (CCMX) 1-46, Metropolitan Stevedore Exhibits (MSX) 1-18, and Pasha, Marine Terminals, and State Compensation Insurance Fund Exhibits (PAX) 1-7. All parties except the Director filed post-trial briefs.

BACKGROUND

The claimant, William Price, was born on November 23, 1931, and graduated from high school in 1950. SSAX 9 at 37. In the mid-1960's, he began working as a industrial mechanic for Marine Terminals and during the course of that work would occasionally experience problems with his knees. Tr. at 58, CCMX 43 at 132-33. After Marine Terminals closed its San Diego facilities in 1986 or 1987, he began obtaining jobs from the Hold Board at his union's hiring hall. CCMX 43 at 185-87. However, some of those jobs exacerbated his knee problems, so by 1990 he transferred to the hiring hall's Lift Board which allowed him to obtain jobs as a forklift driver. CCMX 43 at 148-53. After transferring to the Lift Board, the claimant would occasionally turn down certain jobs that he believed would aggravate his knee condition. CCMX 43 at 207-09.

In July of 1992, the claimant was given a comprehensive physical examination by his private health care provider, Kaiser Permanente (hereinafter "Kaiser"), a health maintenance organization. CX 4. In a questionnaire that was part of the exam, the claimant indicated that he experienced pain in his knees and back and wanted those problems to be specifically addressed. CX 4. On several occasions during the following year, he again sought treatment for knee pain from his primary care physician, Dr. Megorden. CX 6, CX 7, CX 8. On September 23, 1993, the claimant was examined by Dr. R.B. Simpson, an orthopedist, who wrote in his chart notes that x-rays taken that same day had revealed medial joint line "collapse" and varus alignment. CCMX 11. Dr. Simpson also concluded that the claimant "needs TKR-B [total knee replacement-bilateral] when Pt [patient] is ready." CCMX 11, CX 9. According to the claimant, although his Kaiser physicians gave him the option of having such surgery, they also urged him to try injections of pain killers and thereby postpone the surgery until he was 65. Tr. at 64-65, CCMX 43 at 146. The claimant's last employer before the September 23 appointment with Dr. Simpson was Crescent City Marine Ways (hereinafter "Crescent City"), which employed him as a lift truck operator on September 16, 1993. CCMX 2 at 18, CCMX 3 at 35, 36.

In the months following September of 1993, the claimant returned to Kaiser on various occasions to receive injections and other pain medications for his knees. CX 10, CCMX 13, CCMX 14. During one of these visits, he told his physician that he was not yet ready for knee replacement surgery. CX 27 at 18. On June 7, 1994, the claimant received additional injections in his knees and underwent x-rays of both knees. CCMX 15, CCMX 16. On the next day these x-rays were interpreted by a Kaiser radiologist, Dr. Dennis Kaplan, as showing "moderately advanced degenerative changes" with "bilateral medial joint compartment narrowing." CCMX 15. However, according to the testimony of Dr. James London, a board-certified orthopedic surgeon retained by Metropolitan Stevedore (hereinafter "Metropolitan"), these x-rays actually showed that no articular cartilage remained in the medial compartment of either knee and that the claimant's knees were "bone on bone" MSX 12 at 17, 18, 43, 59, 61. The claimant's last employer before the June 7, 1994 x-rays was Marine Terminals, which had employed him on June 6, 1994 to work as a lift-jitney operator. CCMX 2 at 22, CCMX 3 at 35, 36. In August of 1994, the claimant was given an additional prescription for pain medication and told his

physician that he was "thinking about having knees replaced." CCMX 17.

On December 16, 1994, the claimant was seen by Dr. L. Scott Williams, a board-certified orthopedic surgeon employed by Kaiser. CCMX 20. According to the chart notes for that visit, the claimant told Dr. Williams that he had "had enough" and wanted surgical replacement of the knees in both his legs. CCMX 20. According to the claimant, he decided to request the surgery because the injections he had been receiving for his knee pain were only working for a couple of weeks at a time. CCMX 43 at 143. Although the paperwork for the surgery was submitted the same day the claimant saw Dr. Williams, the surgery was delayed for several months because of medical concerns about the claimant's cardiac condition. Tr. at 69, CCMX 43 at 147 (testimony of the claimant), CX 27 at 18 (testimony of Dr. Williams), CX 22 at 78 (report of Dr. Richard Greenfield). According to the claimant, once he decided to have the surgery, he never changed his mind about it. CCMX 43 at 153-54. The claimant's last employer prior to his December 16, 1994 visit to Dr. Williams was Crescent Wharf & Warehouse (hereinafter "Crescent Wharf"), which employed him on December 4, 1994 as a lift truck operator. CCMX 2 at 24, CCMX 3 at 35, 36.

On February 3, 1995, the claimant became concerned that he would be denied a special type of "guaranteed" pay known as "PGP" because of his on-going refusal to accept certain kinds of longshore jobs that he believed to be beyond his physical capacity.[1] Tr. at 72, CCMX 43 at 155-160, 206. Therefore, on February 3, 1995, he left a message with Dr. Megorden's office asking that Dr. Megorden give him a letter verifying that he was medically precluded from performing certain types of jobs. CCMX 21, Tr. at 71-72. This message was then relayed to another Kasier physician, Dr. Bernard Thomas, who on February 6, 1995 sent the claimant a letter in which it was asserted by Dr. Tomas that the claimant was "no longer able to perform his work as a mechanic or longshoreman because of severe arthritis of his knees." SSAX 4. The letter also represented that the claimant was scheduled to undergo surgical replacement of both knees within the next six weeks. Id. The claimant testified that he did not want or ask for a letter precluding him from all longshore employment and that he does not recall what he did with the letter after receiving it. CCMX 43 at 199, Tr. at 198-99. In any event, the claimant continued to work as a longshoreman, and, according to payroll records worked 20 days in February, 17 days in March, and eight days during the first three weeks of April, 1995. CCMX 2 at 25-26.

As part of the preparation for the knee surgery, on April 18, 1995 the claimant signed a consent form and underwent another series of bilateral knee x-rays. CCMX 27, CCMX 29, Tr. at 196-97. The claimant's last employer before these events was Crescent Wharf, which employed him on April 17 as a lift truck operator. CCMX 2 at 26, CCMX 3 at 35, 36. According to a pre-surgery report prepared by Dr. Williams, these x-rays showed bilateral "genu varum, left greater than right," as well as a "[c]omplete loss of medial joint line space with secondary flattening, sclerosis, and other osteoarthritic changes." CX 17. In a subsequent deposition, Dr. Williams also described these x-rays as indicating that "there was no cartilage left" in the claimant's knees and that when he walked he was rubbing "bare bone on bare bone." CX 27 at 9. Dr. Williams also explained that the term "secondary flattening" means that parts of one of the bones comprising the knee joint has been gradually worn or rubbed away. CX 27 at

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[1]A collective bargaining agreement guarantees a certain level of pay to members of the claimant's union even when work is not available. Tr. at 70-72, 191-96. However, this guaranteed pay can apparently be denied to workers who, without a medical excuse, turn down work that they are qualified to perform. Id.

The knee replacement surgery was performed by Dr. Williams on April 24, 1995, and, according to the post-operative report was "uneventful." CX 18. According to Dr. Williams, his visual observations during the surgery were entirely consistent with the last pre-surgery x-rays and verified the x-ray indications of eburation, a process he described as "carving a depression in the bone." CX 25 at 24.

The claimant's last day of employment before his knee surgery was April 22, 1995. Tr. at 73-75, CCMX 2 at 26. On that date, he worked for Metropolitan, which hired him to operate a forklift. CCMX 43 at 211-12. According to the claimant, while operating the forklift he had to use gas and brake pedals and during the course of his eight-hour shift would have probably mounted and dismounted from the vehicle between six and 12 times. Tr. at 74-75,CCMX 43 at 211-12. As the day wore on, he testified, his knee condition "got progressively worse." Tr. at 75. The claimant also testified that by this time his knees were hurting every day and usually hurt more at the end of each day. CCMX 214.

On July 10, 1995, Metropolitan received from the claimant a Longshore Act Form LS-203 claim for benefits.[2] MSX 1, MSX 2, Tr. at 204. The form was dated June 19, 1995 and sought compensation for cumulative trauma to both knees "at various waterfront locations." MSX 2 at 6. The date of injury was represented to be "accumulative to 2/6/95." On the following day, Metropolitan submitted to the Office of Workers' Compensation Programs (OWCP) a First Report of Occupational Illness and a Notice of Controversion. MSX 14, MSX 15. In addition, on August 4, 1995, Antoinette Smith, a senior claims examiner for Metropolitan, sent the claimant's attorney a letter in which she reported that payroll records showed that the claimant had not worked for Metropolitan at any time between February 6, 1994 and February 6, 1995. MSX 4. See also CCMX 2, CCMX 3 (payroll records verifying that the claimant did not in fact work for Metropolitan during the 52 weeks prior to February 6, 1995).

On October 30, 1995, the claimant's physician authorized him to return to work during the following week. CCMX 33. Accordingly, on November 8, 1995, the claimant returned to full time work as a longshoreman. CCMX 1, CCMX 2, CCMX 43 at 162-63.

On March 21, 1996, Metropolitan received in the mail a copy of a February 29, 1996 report from Dr. Sidney Levine entitled "Qualified Medical Examination." CX 20. The report indicated that the claimant's work injury was "CT" that had occurred in "4/95," that the claimant's employer was Metropolitan Stevedore, and that the claimant had undergone total knee replacement surgery on April 24, 1995. Nothing in the report explicitly indicated that it should be regarded as a claim for Longshore Act benefits and there is no indication that the report was sent to the Office of Workers' Compensation Programs.

On September 26, 1996, Metropolitan received from the claimant a second Longshore Act form LS-203. MSX 3 at 7. This form also referred to cumulative trauma to the claimant's knees, but unlike the form LS-203 received by Metropolitan in 1995, this form listed the date of injury as "4-22-94" to "4-22-95." At the top of the claim form, someone had written the word "amended." This amended claim

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[2]A copy of this same form was received by the Office of Workers' Compensation Programs on August 7, 1995. MSX 10.

was controverted by Metropolitan in a Notice of Controversion dated October 1, 1996. MSX 18.

On January 1, 1997, the claimant voluntarily retired from longshore employment. CCMX 43 at 162-63.

In April of 1998, the claimant filed claims for his knee injuries against Crescent Wharf, Marine Terminals, Pasha, and Crescent City. SSAX 6, CCMX 37, CCMX 38. All of these additional claims were subsequently controverted by the named employers. PAX 5, SSAX 6 at 88, CCMX 40.

ANALYSIS

All parties except the Director have stipulated: (1) that all the claimant's alleged injuries occurred at a maritime situs and while the claimant was employed in a maritime status, and (2) that the claimant's earnings between April 22, 1994 and April 22, 1995 averaged $1,203.59 per week. I find these stipulations to be fully supported by the evidence and hereby adopt them as findings of fact. In addition, all parties except the Director and Metropolitan have stipulated that the claimant was totally temporarily disabled from April 24, 1995 through November 5, 1995.[3]

The following issues are in dispute: (1) the identity of the last responsible employer, (2) the timeliness of the claimant's notice of injury, (3) the timeliness of the claim for benefits, (4) the date of maximum medical improvement, (5) the claimant's average weekly wage, (6) the extent of the claimant's permanent partial disability, (7) the responsible employer's entitlement to Special Fund relief, and, if Metropolitan Stevedore is the responsible employer, (8) the period of the claimant's entitlement to temporary total disability benefits.

1. Identity of the Last Responsible Employer

Under the so-called "last responsible employer rule" a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for more than one employer. Cordero v. Triple A Machine Shop, 580 F.2d 1331 (9th Cir. 1978). The rule is designed to avoid the expense and complications that would be inherent in any effort to apportion liability among employers according to their individual contributions to a worker's disability. Id. at 1336; Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2nd Cir. 1955). Constitutional challenges to the rule on due process and equal protection grounds were explicitly rejected in the Cordero decision, which in effect held that assigning sole responsibility to a single employer is constitutional so long as there is a "rational connection" between the injured worker's employment and the development or aggravation of the worker's disability. See also Port of Portland v. Director, OWCP, 932 F.2d 836, 840-41 (9th Cir. 1990) (holding that a "rational connection" is absent when it would be "factually impossible" for a particular employer to have

[3]Metropolitan agrees with this stipulation insofar as it establishes that the period of total temporary disability ended on November 5, 1995, but disagrees with the stipulation insofar as it provides that the period of disability commenced on April 24, 1995. Tr. at 25-29. However, Metropolitan does concede that the claimant was unable to work between April 25 and November 5, 1995. Tr. at 25-28.

contributed to a worker's disability, but also noting that the Cordero decision "does not require a demonstrated medical causal relationship between [a] claimant's exposure and his occupational disease").

When applying the last employer rule, the Ninth Circuit has utilized two distinct tests to determine which of an injured worker's employers will be held liable for all of the worker's disability. The first test applies in cases involving disabilities that are categorized as occupational diseases and the second test applies in cases involving disabilities that are the result of multiple or cumulative traumas. Foundation Constructors v. Director, OWCP, 950 F.2d 621, 623-24 (9th Cir. 1991). Under the rule which applies in occupational disease cases, the responsible employer is the employer which last exposed the worker to injurious stimuli prior to the date upon which the worker became aware that he was suffering from an occupational disease arising from his employment.[4] See Port of Portland v. Director, OWCP, 932 F.2d 836, 840 (9th Cir. 1991); Kelaita v. Director, OWCP, 799 F.2d 1308, 1311 (9th Cir. 1986). In contrast, under the rule which applies in traumatic injury cases, the identity of the responsible employer depends upon the cause of the worker's ultimate disability. On one hand, if the worker's ultimate disability is the result of the natural progression of a traumatic injury and would have occurred notwithstanding the subsequent injury, the employer that employed the worker on the date of the initial injury is the responsible employer. On the other hand, if the worker's disability is at least partially the result of a new traumatic injury that aggravated, accelerated or combined with a prior injury to create the ultimate disability, the employer that employed the worker at the time of the new injury is the responsible employer. Foundation Constructors, supra, at 624.

In this case, the claimant's injury was caused by cumulative trauma and thus the responsible employer is the last employer to have subjected the claimant to trauma that combined with, aggravated, or accelerated his pre-existing knee condition.[5] Although the parties apparently agree that this is the appropriate standard, they vigorously disagree on how this standard should be applied to the facts of this case. On one hand, the claimant and all the defendants except Metropolitan contend that Metropolitan was the last employer to have subjected the claimant's knees to cumulative trauma and that it is therefore the last responsible employer. On the other hand, Metropolitan contends that there is neither a factual nor legal basis for finding it to be the last responsible employer.

A. Alleged Lack of a Factual Basis for Finding Metropolitan to be the Responsible Employer

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[4]The generally accepted definition of an occupational disease is "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree in comparison with employment generally." Port of Portland v. Director, OWCP, 192 F.3d 933, 939 (9th Cir. 1999) (noting, *inter alia*, that walking is not an activity particular to the work of a longshoreman). See also Gencarelle v. General Dynamics Corp., 892 F.2d 173, 176 (2nd Cir. 1989) (citing 1B Larson, The Law of Workmen's Compensation §41.00 at 7-353); Steed v. Container Stevedoring Company, 25 BRBS 210, 215 n. 2 (1991).

[5] It is noted in this regard that although a few state courts have held that cumulative trauma is a type of occupational disease, the Ninth Circuit has a different view. For example, in Foundation Constructors the Ninth Circuit explicitly concluded that a back condition that resulted from repeatedly operating jackhammers and lifting 100-pound weights did not constitute an occupational disease. 950 F.2d at 624. Similarly, in Kelaita the Ninth Circuit upheld the Benefits Review Board's decision that cumulative trauma to a claimant's arm did not amount to an occupational disease. 799 F.2d at 1311-12.

In asserting that there is an inadequate factual basis for finding it to be the last responsible employer, Metropolitan contends that the claimant has failed to make a sufficient showing that he suffered any sort of permanent pre-surgery disability as a result of injuries suffered during the course of his employment on April 22, 1995. In contrast, the claimant contends that a clear preponderance of the evidence shows that he was in fact injured during the course of his work for Metropolitan and that the injury did in fact cause a small but permanent increase in the extent of his pre-surgery disability.

Insofar as the claimant contends that he suffered an injury, he is aided by the provisions of subsection 20(a) of the Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary---(a) that the claim comes within the provisions of the Act...." In order to invoke this presumption, a claimant must produce evidence indicating that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982). However, a claimant is entitled to invoke the presumption if he or she adduces at least "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. Brown v. I.T.T./Continental Baking Co., 921 F.2d 289, 296 n.6 (D.C. Cir. 1990)(emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting substantial evidence to counter the presumed relationship between the claimant's impairment and its alleged cause. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982). Under the Supreme Court's decision in Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. See also Holmes v. Universal Maritime Services Corp., 29 BRBS 18, 21 (1995). However, the subsection 20(a) presumption does not assist claimants in proving that any disability resulting from a work injury was in fact permanent. Holton v. Independent Stevedoring Co., 14 BRBS 441 (1981); Duncan v. Bethlehem Steel Corp.,
12 BRBS 112 (1979).

In contending that he did in fact suffer an increase in his permanent pre-surgery disability as a result of his employment by Metropolitan on April 22, 1995, the claimant relies primarily on the medical opinions of Dr. Levine, Dr. Greenfield, and Dr. Williams. According to Dr. Levine, the claimant sustained additional trauma to his knees every day that he worked, including April 22, 1995. Tr. at 83-85, 119. He further testified that even if all of the cartilage in the claimant's knees had been worn away by June of 1994, the claimant's knee condition would have continued to be aggravated by his work. Tr. at 90. In particular, Dr. Levine opined, after all the cartilage had been lost the bones in the claimant's knees would have started to harden and developed increased spurring. Tr. at 90, 116. As well, he testified, the "varus deformity" that caused the claimant to be "bowlegged" would have continued to progress as the claimant's knee bones gradually wore away in an uneven fashion. Tr. at 90-92. Although Dr. Levine conceded that it would not have been possible at the time of the claimant's surgery to identify any "fresh erosion or wear" that occurred during the preceding weeks, he also testified that the inability to visually observe such changes doesn't mean that there had been no worsening in the claimant's knee condition. Tr. at 117-18, 129. Rather, he contended, the claimant's knees continued to degenerate until the date of surgery. Tr. at 130. Dr. Levine also testified that the fact that claimant continued to work until a few days prior to his surgery showed that there was still "some life left in his knees." Tr. at 126.

Like Dr. Levine, Dr. Greenfield has also opined that the claimant's work contributed to the deterioration of his knee condition and that the deterioration continued through the claimant's last day of employment. Tr. at 142, 151-52 (testimony), CX 22 at 85 (report indicating that in Dr. Greenfield's opinion the claimant's impairment "is related" to the claimant's last day of employment). In particular, Dr. Greenfield opined, "every single day" the claimant "walked and stood and got up and got down," he permanently "wore off a few more cells of cartilage and a few more cells of bone." Tr. at 142, 173-74. In fact, he testified, if fluids had been withdrawn from the claimant's knee and examined under a microscope, every day there would have been new "cartilage flakes and bone flakes." Tr. at 144-45. 163-64. Dr. Greenfield further testified that in his opinion, the claimant's work activities between April 18, 1995 and his April 24, 1995 surgery "absolutely" contributed to the wearing away of the claimant's knees. Tr. at 151-52.

Although Dr. Williams testified that the deterioration of the claimant's knees would have been "hard to measure," he also in effect agreed with Dr. Levine and Dr. Greenfield insofar as they testified that the deterioration of the claimant's knees was a continuing process that didn't stop until the claimant underwent his knee replacement surgery. CX 27 at 11-12, 25-26. In addition, Dr. Williams opined that any job that required the claimant to climb up and down from a forklift and push foot pedals would have been a factor in the deterioration of the claimant's knees. Id.

The opinions of these physicians are partially corroborated by the claimant, who testified that his knees were "getting worse" as time went along and that "basically" his knees got progressively worse until the day of the surgery. CCMX 43 at 217 (deposition testimony), Tr. at 73 (trial testimony). However, the evidentiary value of these statements is reduced by the fact that the claimant has also testified that it seemed to him that his knee condition "remained the same" between the date he requested the knee surgery and the date of the surgery. CCMX 43 at 197-98.

Metropolitan's contention that the claimant did not suffer a permanent increase in his pre-surgery disability is based primarily on the reports and testimony of Dr. London. According to Dr. London, even though the claimant's work activities between September of 1993 and April 22, 1995 "undoubtedly continued to exacerbate his symptoms," these work activities "did not result in any permanent worsening or aggravation" of the claimant's condition. CCMX 42 at 119, MSX 12 at 16. Dr. London further opined that because the x-rays taken on April 18, 1995 confirmed that all cartilage was gone from the claimant's knees, none of the claimant's activities after April 18, 1995 in any way reduced his ability to work, increased the need for his surgery, or changed the extent of his post-surgery disability. MSX 13 (February 17, 2000 report). In fact, he added, because the claimant's knee bones had by that time become sclerotic, they were less prone to wear and therefore it is not medically probable that any further bone loss or inflamation occurred following April 18, 1995. Id. Dr. London conceded that the claimant's condition could have been worsened by his work activities after September of 1993 if such activities had so severely worn away the bones in his knees that it became necessary to perform surgery of a type different from the surgery originally recommended in 1993, but pointed out that the surgical procedure performed in 1995 was in fact "the exact same procedure" recommended in 1993. CCMX 42 at 119, MSX 12 at 16. In addition, Dr. London testified, even though the claimant's knees were in a "bone on bone" condition by the time he underwent the knee replacement surgery, nothing that occurred after September of 1993 changed the period of recovery or the claimant's ultimate post-surgery impairment. MSX 12 at 18-28. Dr. London also asserted that because the claimant's knee replacement surgery "was already recommended" in September of 1993, the claimant's subsequent work activities "did not worsen his underlying condition" and could not have hastened the need for that surgery, which Dr. London

characterized as "inevitable." CCMX 42 at 119-20 (report of June 7, 1999).

After considering the foregoing evidence, I find that the opinions of Dr. Levine, Dr. Greenfield and Dr. Williams are sufficient to warrant invocation of the subsection 20(a) presumption that the claimant suffered a work-related injury while employed by Metropolitan on April 22, 1995. I further find that the testimony of Dr. London constitutes substantial evidence and is therefore sufficient to rebut that presumption. It is thus necessary to consider all of the relevant evidence to determine if the claimant has shown by a preponderance of the evidence that he did in fact suffer an injury during the course of his work on April 22, 1995 and that the disability resulting from any such injury was permanent. After so considering the evidence, I conclude that the claimant has in fact shown by a preponderance of the evidence that injuries suffered during his April 22, 1995 employment by Metropolitan did in fact cause some minor but permanent increase in the extent of his disability and increase the need for his knee surgery. There are two reasons for this conclusion.

First, despite Dr. London's assertion that the claimant's work activities following April 18, 1995 did not result in any permanent increase in the claimant's pre-surgery knee impairment or reduce his ability to work, Dr. Levine, Dr. Greenfield, and Dr. Williams have provided persuasive reasons for concluding that on each additional day the claimant worked there was a gradual, albeit barely perceptible permanent loss of bone and cartilage from the claimant's knees which caused the claimant to become progressively more bowlegged. Dr. London's suggestion that the onset of sclerosis in the claimant's knee bones would have prevented such further bone erosion after April 18, 1995 is unconvincing because it is inconsistent with the testimony of Dr. Williams indicating that by the time of the claimant's surgery a "depression" had been carved into the bones in the claimant's knees and with Dr. Levine's testimony that even sclerotic bone can gradually be worn away and cause a patient to become more bowlegged. CX 27 at 13, 23-24 (testimony of Dr. Williams), Tr. at 90-91 (testimony of Dr. Levine). It is further noted that although knee replacement surgery was medically justified well before April of 1995, the claimant was nonetheless able to perform his usual longshore job only two days before the surgery and testified that he would have continued performing such work for at least a month even if the surgery had been postponed. It is thus obvious that on April 22, 1995 the claimant's knee condition had not yet progressed to the point of maximum disability, i.e, to a point where the claimant had a total inability to use his legs. It is therefore reasonable to conclude that even after the claimant's surgery had been scheduled, additional work-related aggravations of his knee condition were still gradually decreasing his ability to ambulate and thereby still permanently increasing the extent of his disability.

Second, even though the claimant had been in need of surgery even before his last day of work, the wearing away of bone that occurred on that last day still marginally increased the need for such surgery. Although Dr. London has disputed this conclusion and asserted that the claimant's post-1993 longshore work did not increase the need for the knee replacement surgery, that assertion is unpersuasive because it is inconsistent with the fact that other medical experts have credibly testified that the claimant's work probably increased his knee pain and that the timing of knee replacement surgery primarily depends upon how long the patient is able to tolerate his or her knee pain. CX 27 at 9, 12-13 (testimony of Dr. Williams that any increase in the wearing away of bone and cartilage increases the extent of a patient's problems, including pain), Tr. at 104 (testimony of Dr. Levine that the timing of knee replacement surgery depends on when the patient is no longer able to tolerate his or her knee pain), Tr. at 138 (testimony of Dr. Greenfield that he tells his patients to have knee replacement surgery when "you can't

take any more"). Indeed, even Dr. London has conceded that "pain is the most common indication for surgery" and that "more pain" is "a greater indication" for surgery. MSX 12 at 43.

B. Alleged Lack of a Legal Basis for Finding Metropolitan to be the Responsible Employer

Metropolitan also argues that even if the work the claimant performed while employed by Metropolitan on April 22, 1995 did in fact cause some permanent increase in his pre-surgery disability or increase the need for his surgery, it still could not possibly be the last responsible employer because the claimant's knee replacement surgery had been planned several months earlier and any injury that might have occurred during the course of the claimant's April 22, 1995 employment did not cause the surgery to occur any sooner, lengthen the post-surgery period of temporary disability, or increase the extent of permanent disability following from the surgery. Indeed, Metropolitan contends that any decision holding an employer liable in such circumstances would violate the employer's Fifth Amendment rights to due process and equal protection of the law. Metropolitan also asserts that its position is supported by language in a series of Ninth Circuit decisions including the Cordero decision, the 1990 Port of Portland decision, and the recently issued (but unpublished) decision in Maersk Stevedoring Company v. Container Stevedoring Company (Case No. 98-70852, January 11, 2000).

I find that the weight of the medical evidence clearly supports Metropolitan's assertion that any injury that might have occurred during the course of the claimant's April 22, 1995 employment did not cause his knee replacement surgery to occur any sooner, lengthen the post-surgery period of temporary disability, or increase the extent of the claimant's permanent disability. However, this finding does not provide sufficient legal grounds for assigning last responsible employer liability to some other employer. There are several reasons for this conclusion.

First, because the weight of the evidence shows that during the course of the claimant's employment by Metropolitan on April 22, 1995 he suffered injuries that permanently increased his pre-surgery disability and increased the need for his previously scheduled surgery, there is no constitutional impediment to finding that Metropolitan is the last responsible employer. Although the knee surgery was scheduled well before the April 22 employment, this fact alone does not logically establish that there was no "rational relationship" between this employment and the claimant's pre-surgery disability. Nor does the fact that the surgery had been previously scheduled necessarily mean that there was no rational relationship between the claimant's April 22, 1995 employment by Metropolitan and his post-surgery disability. Metropolitan's error in arguing otherwise is due to its implicit assumption that it is the surgery that caused the claimant's permanent disability, not the claimant's work injuries. This assumption is incorrect. The surgery actually reduced the extent of the claimant's permanent disability and thus the remaining disability can only be attributed to the work injuries. There is, moreover, no way of apportioning responsibility for the post-surgery disability among the employers who contributed to the pre-surgery disability which could not be assailed as being even more arbitrary than the last employer rule.[6] In short, a finding that the last of these employers is responsible for the entire residual disability

[6] Although it could be argued that "credit" for the improvements achieved by the surgery should be given to the most recent employers like Metropolitan (i.e., last in-first out), it could just as logically be argued that credit for the improvements should be given to the earliest potentially

would not be so irrational that it violated that employer's constitutional rights. It should also be noted that if the claimant had elected to retire on April 24, 1995 instead of undergoing the knee replacement surgery, the responsible employer would have clearly been the employer last associated with an injury causing a permanent increase in the extent of the claimant's disability. Allowing the claimant's personal decision to undergo the surgery to interfere with that result would itself be arguably irrational.

Second, Metropolitan is on unsound ground insofar as it argues that proper application of the last responsible employer rule requires that liability for the claimant's disability be assigned to the employer at the time of the last injury before surgery was medically justified rather than to the employer for whom the claimant worked at the time of the last injury to have permanently aggravated his pre-surgery disability. This assertion has previously been considered and rejected by the Benefits Review Board. See Abbott v. Dillingham Marine and Manufacturing Co., 14 BRBS 453 (1981), aff'd sub nom. Williamette Iron and Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982).

Third, although there is a recent unpublished Ninth Circuit decision holding that an employer can escape liability by submitting affirmative factual proof that a claimant's disability did not worsen during the period of the claimant's employment (Maersk Stevedoring) and an earlier decision holding that an employer can avoid liability by showing that it could not have even theoretically contributed to a worker's disability (i.e., the 1990 Port of Portland decision holding that an employer that had not employed a claimant until after he had undergone a determinative audiogram could not logically be the last responsible employer), both of those decisions involved occupational injuries (noise related hearing losses), not traumatic injuries like the knee injuries at issue in this case.[7] More importantly, in this case Metropolitan has failed to produce any convincing affirmative factual proof of the type that was found to be determinative in the Maersk Stevedoring decision and has also been unable to demonstrate any sort of logical impossibility such as was shown in the 1990 Port of Portland case.

Finally, it is noted that Metropolitan is mistaken in suggesting that the claimant's early awareness of the onset of his disability in some way excludes Metropolitan from consideration as the last responsible employer. Although determinations concerning a claimant's awareness of onset of disability are important in determining the identity of the last responsible employer in cases involving occupational injuries, awareness of disability is not a relevant inquiry in determining the last responsible employer in traumatic injury cases like this one. See, e.g., Kelaita, supra, at 1311. See also Steed v. Container Stevedoring Co., 25 BRBS 210, 219-20 (1991). Moreover, even in occupational disease cases a worker's early awareness of a work-related disability does not relieve subsequent employers from liability if during the course of working for those employers the worker suffered injuries that permanently increased the extent of his or her pre-existing disability.

2. Timeliness of Notice of Injury

Subsection 12(a) of the Act provides, inter alia, that a claimant must give an employer notice of

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responsible employers (i.e., first in-first out).

[7]Moreover, the unpublished decision in Maersk Stevedoring may conflict with the published decision in Lustig v. U.S. Department of Labor, 881 F.2d 593 (9th Cir 1989), which held in effect that the last responsible employer rule could be used to hold an employer liable even in a case where a disabled worker's exposure to a harmful substance (asbestos) by the employer was so recent that such exposure could not have medically had any role in causing the worker's disability.

a compensable work-related injury within 30 days of the injury or within 30 days after the employee is aware of a relationship between the injury and the employment unless the claimant's injury is an "occupational disease which does not immediately result in disability or death," in which case notice must be given within one year after the claimant becomes aware of the relationship between the employment, the disease, and the death or disability. However, subsection 12(d)(2) provides that failure to give timely notice shall not be a bar to the recovery of benefits if the responsible employer or carrier was not prejudiced by the claimant's failure to provide notice in a timely fashion. Moreover, there is a presumption that the employer was not prejudiced by lack of timely notice which, under the provisions of subsection 20(b) of the Act, can be overcome only if the employer produces substantial evidence to the contrary. See Kashuba v. Legion Insurance Co., 139 F.3d 1273, 1275 (9th Cir. 1998); Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989); Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233, 240 (1990).

In this case, Metropolitan asserts that it was in fact prejudiced by the five-month delay in receiving notice of the cumulative injuries alleged in the initial July 1995 claim and by 16-month delay in receiving notice of the April 22, 1995 injury. Metropolitan thus contends that the claimant's request for compensation is barred under the provisions of section 12. The claimant, however, contends that even if he did fail to provide timely notice to Metropolitan, his claim is still valid because the company was not prejudiced as a result of the delay.

Although subsection 12(d) does not specify the type of showing that a defendant must make in order to establish that it was prejudiced by a failure to receive timely notice, helpful guidance can be found in the Ninth Circuit's Kashuba decision. In that decision, the court noted that three purposes are served by the notice requirement: "effective investigations, providing effective medical services, and preventing fraudulent claims." 139 F.3d at 1276. Thus, the court held that in the Ninth Circuit evidence "that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services" is sufficient to meet the employer's burden.[8] 139 F.3d at 1276. However, the court also pointed out that mere conclusory allegations of prejudice are not sufficient. Id. See also ITO Corporation v. Director, OWCP, 883 F.2d 422, 424 (5th Cir. 1989) (holding that generalized assertions that an employer was prejudiced because it had no opportunity to investigate a claim when it was fresh are not sufficient to show prejudice).

Metropolitan's argument that it was prejudiced by the claimant's failure to provide timely notice of his work-related injury is based entirely on the testimony of Ms. Smith, who as previously noted, is a senior claims examiner for Metropolitan. According to her testimony, if she had been given a request for medical treatment from Kaiser prior to the claimant's April 24, 1995 surgery, she would have first reviewed the "causation" question to determine the identity of the responsible employer, taken the claimant's statement to find out if anything "specifically happened" on the last day of employment by Metropolitan, obtained a "medical consultation to determine the extent of disability" and had them [medical consultants] "compare diagnostic tests to find out whether we are, in fact, the last responsible

[8]See also 7 A. Larson, Larson's Workers' Compensation Law §78.32 at 15-194 to 15-205 (1999)(observing that proof of lack of prejudice usually follows the pattern set by the two objectives of the notice statute: first a showing that the claimant's injury was not aggravated by reason of the employer's inability to provide early diagnosis and treatment; and second, a showing that the employer was not hampered in making its investigation and preparing its case).

employer." Tr. at 207-08. When asked to explain her reference to "diagnostic tests" she indicated that she was referring to certain tests described earlier in the trial by Dr. Greenfield, who opined that it could be possible to determine if a claimant had suffered recent knee damage by conducting a microscopic examination of the fluids in the claimant's knee at the time of his surgery. Tr. At 208 (testimony of Ms. Smith), Tr. at 144-45, 163-64 (testimony of Dr. Greenfield). In addition, Ms. Smith testified, if she had known before April 22, 1995 that the claimant had been scheduled for knee replacement surgery she would have taken steps to ensure that the claimant not be allowed to work for Metropolitan. Tr. at 208-10.

For the following reasons, I find that even if the foregoing testimony could be viewed as substantial enough to rebut the subsection 20(a) presumption that sufficient notice has been provided, on balance the preponderance of the evidence shows that Metropolitan was not in fact prejudiced by the claimant's failure to provide the 30-day notice specified in subsection 12(a).

First, although there are apparently no published decisions on this issue, logic suggests that when a worker has sustained a series of traumatic injuries which have each caused at least some increase in the extent of the worker's permanent disability, the 30-day notice period does not expire until 30 days after the last injury in the series. Thus, in this case, the subsection 12(a) notice period would not have expired until May 22, 1995, by which time it would have been too late for Metropolitan to have either barred the claimant from re-employment or taken pre-surgery fluid samples from his knees.

Second, Metropolitan's assertion that the claimant's failure to provide timely notice of his injury prevented it from having him barred from further employment and from collecting fluid samples from his knees appears to be based on a clearly erroneous assumption about when the notice should have been filed, i.e., on an assumption that the claimant had an obligation to have filed a notice of injury within 30 days after the "cumulative to 2/6/95" date of injury alleged his initial claim. In fact, no such obligation existed because the claimant did not work for Metropolitan at any relevant time prior to February 18, 1995. See, e.g., CX 1 (payroll records affirmatively showing that the claimant was not employed by Metropolitan at any time between January 6, 1990 and February 18, 1995). Hence, the earliest conceivable date of any injury arising out of employment at Metropolitan is February 18, 1995.

Third, even if February 18, 1995 could be used as the date of injury for section 12 purposes, it is unlikely that a timely notice of injury would have actually resulted in either a pre-surgery ban on the claimant's re-employment or an attempt to analyze the fluids in his knees. In this regard, it is noted that if notice of an injury had been given to Metropolitan within 30 days of February 18, 1995 (i.e., by March 20, 1995), in all likelihood Metropolitan would still have not had enough information to have motivated it to ban the claimant from re-employment or to try to obtain fluid samples from his knees. Rather, the necessary information would have probably not been known to Metropolitan until it had first obtained and reviewed the claimant's medical records. Before this could have occurred the medical records would have had to have been requested by Metropolitan, copied by Kaiser, and then sent to Metropolitan. It seems unlikely that all of these actions could have occurred within the four week period between March 20 and April 22, 1995. Indeed, the evidence indicates that Metropolitan's investigation of the medical history of persons filing new Longshore Act claims is considerably slower. For example, the trial testimony indicates that Metropolitan did not make any attempt to depose the claimant, obtain copies of his Kaiser records, or have him examined by a physician until almost one year after receiving the claimant's amended claim in July of 1996. Tr. at 224-26. Although it has been suggested that this year-long delay in obtaining the relevant information was due to the fact that Metropolitan knew that the

claimant's surgery had already occurred, this explanation does not apply to Metropolitan's failure to promptly request the claimant's medical records after the initial claim was filed in July of 1995. Nothing in that claim indicates that surgery had already been performed and Ms. Smith has acknowledged that, in fact, it was not until July of 1996 that she first learned of the claimant's surgery. Tr. at 207.

Fourth, although it is theoretically possible for an employer to show that an injured worker's failure to provide timely notice denied the employer an opportunity to provide medical care that could have achieved a better result than was achieved in the absence of proper notice, there is no such evidence in this case. In fact, all of the medical experts agree that the claimant needed knee replacement surgery and none of these experts has in any way suggested that the medical care the claimant received from Kaiser was in any way inferior to the medical treatment that he could have received elsewhere. Indeed, as explained infra, the knee replacements provided by Kaiser achieved results that are about as good as can be expected from any knee replacement surgery.

Fifth, in contrast to the situation described in the Kashuba decision, there is no evidence in this case that in any way suggests that a timely notice of injury could have somehow helped Metropolitan rebut a potentially fraudulent claim. For example, in this case, unlike the Kashuba case, there is no reason to suspect that the claimant's injury was not work-related or to doubt the claimant's representations concerning any other aspects of his claim.

Finally, although Ms. Smith's testimony accurately indicates that neither the claimant nor Kaiser sought Metropolitan's advance authorization for the April 24, 1995 surgery, Metropolitan is mistaken insofar as it may be assuming that the failure to make such a request somehow provides a valid basis for rejecting the claimant's request for disability compensation. Even though subsection 7(d) of the Longshore Act does indicate that an injured worker should make an advance request for medical treatment, the Act's only sanction for failing to make such a request is a provision that sometimes precludes the worker from obtaining reimbursement for the costs of such treatment.[9] Likewise, although subsection 7(d)(2) of the Act requires medical care providers to submit a claim for the costs of the treatment of an injured worker within 10 days after the treatment is first provided, nothing in the Act in any way suggests that a failure to submit such a claim by the tenth day provides a basis for denying wage-loss compensation to the injured worker.

3. Timeliness of the Claim for Benefits

As previously explained, the claimant was not in fact employed by Metropolitan at any time in the one-year period preceding the date of injury alleged in his first claim ("accumulative to 2/6/95") and the claimant's September 1996 "amended" claim against Metropolitan was not filed until well over a year after the claimant's April 22, 1995 work injury. Accordingly, Metropolitan argues that any claim against it is now barred by subsection 13(a) of the Act, which explicitly provides that all claims for work-related traumatic injuries must be filed within one year after the injury. In response, the claimant contends, *inter alia*, that his claim is not barred because his September 1996 "amended" claim constituted a permissible amendment to the claim sent to Metropolitan in July of 1995.

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[9]In this regard, it is noted that in this case the claimant is not seeking and cannot be granted a Longshore Act award for the cost of his surgery or for any of the other treatment provided by Kaiser. Tr. at 11-13; Nooner v. National Steel and Shipbuilding Co., 19 BRBS 43 (1986).

There are apparently no decisions under the Longshore Act which specifically resolve the question of whether it is permissible after the relevant limitations period has run for a claimant to amend a timely but otherwise meritless claim to correct an incorrect "date of injury." However, the leading treatise on workers' compensation law indicates that, as a general rule in workers' compensation cases, "considerable liberality is usually shown in allowing amendment of pleadings to correct such defects as vagueness, omission of essential facts, or inaccuracy in the description of the injury" so long as the amendment does not result in "undue surprise or prejudice to the opposing party." 7 A. Larson, Larson's Workers' Compensation Law §77A.43 at 15-38 to 15-44 (1999)(footnotes omitted). A earlier version of this passage was cited with apparent approval by the Supreme Court in U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 613 n.7 (1982). Moreover, the Supreme Court's concurrence with Larson's observation was in turn cited by the Benefits Review Board in its holding in Mikell v. Savannah Shipyard Co., 24 BRBS 100 (1990), that because an Administrative Law Judge's had determined that there was no prejudice to the defendants, it was permissible, even after the expiration of the statutory limitations period, to allow a timely Longshore Act claim to be amended to state an entirely new theory of recovery and thereby impose liability on an insurer that would have otherwise not been the responsible insurer.[10] Similar decisions have even been issued in cases governed by the Federal Rules of Civil Procedure. See Rural Fire Protection Co. v. Hepp, 366 F.2d 355, 361-62 (9th Cir. 1966)(holding that even though the limitations period had run, it was permissible for plaintiffs seeking payment of unpaid wages to amend their otherwise timely complaint to include a demand for an additional category of wages). Accordingly, I conclude that the claimant's September 1996 "amended" claim should be regarded as a permissible amendment to his initial claim unless Metropolitan can show that it has been "unduly" surprised or prejudiced by the amendment. In this regard, it is noted that although Metropolitan has asserted that it has been prejudiced by the claimant's failure to provide timely notice of his injury, it has not alleged that any additional or greater prejudice resulted from the September 1996 amendment to the initial claim. Nor is there any evidence in the record that would suggest that any such prejudice has occurred. Likewise, there is no reason to believe that the amended claim was an undue, last minute surprise that somehow handicapped the presentation of Metropolitan's case. Indeed, the amended claim was provided to Metropolitan more than three years prior to the trial of this case. I therefore find that the amendment to the initial claim was permissible and that the amended claim is not barred under the provisions of section 13.[11]

4. Date of Maximum Medical Improvement

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969); Air America, Inc. v. Director, OWCP, 597 F.2d 773, 781-82 (1st Cir. 1979); Crum v. General Adjustment Bureau, 738 F.2d 474, 480 (D.C. Cir. 1984); Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached

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[10]Other holdings in the Mikell decision were reconsidered but not altered by the BRB in a subsequent decision. Mikell v. Savannah Shipyard Co., 26 BRBS 32 (1992), aff'd mem.14 F.3d 58 (11th Cir. 1994).

[11]In view of this finding , it is unnecessary to consider the claimant's contention that Dr. Levine's report of February 29, 1996 constituted a timely claim or the contention that the limitations period was tolled under the provisions of subsection 30(f) of the Act.

the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. Williams v. General Dynamics Corp., 10 BRBS 915 (1979); Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988); Dixon v. John J. McMullen and Associates, Inc., 19 BRBS 243 (1986); Trask v. Lockheed Shipbuilding and Construction Co., 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. Brown v. Bethlehem Steel Corp., 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. Abbott v. Louisiana Insurance Guaranty Ass'n, 27 BRBS 192, 200 (1993), aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott, 40 F.3d 122, 126 (5th Cir. 1994).

In this case, the claimant contends that his condition did not reach the point of maximum medical improvement until February 29, 1996. His primary support for this contention is the February 29, 1996 report in which Dr. Levine opined that the claimant's condition had become permanent and stationary. CCMX 34 at 85. In contrast, Metropolitan asserts that the claimant's condition became permanent and stationary on October 30, 1995. Metropolitan's position is based on a form signed on October 30, 1995 in which Dr. Williams indicated that the claimant could return to work without restrictions on November 6, 1995. CCMX 33.

Review of the relevant medical evidence indicates that although Dr. Williams did opine on October 30, 1995 that the claimant could return to work in November of 1995, Dr. Williams did not expressly conclude that the claimant's condition had become permanent and stationary. Thus, it is at least conceivable that Dr. Williams believed that the claimant had not yet achieved a full recovery from his surgery, but could nonetheless return to work without endangering the recovery process. Moreover, although Dr. Levine did not examine the claimant until almost ten months after the claimant's surgery, Dr. Levine is first physician to have explicitly found that the claimant's condition had in fact reached the point of maximum medical improvement. I therefore conclude that the date of maximum medical improvement is the date chosen by Dr. Levine: February 29, 1996

5. Average Weekly Wage

The claimant contends that his average weekly wage at the time of his April 22, 1995 injury was $1,203.59 and that he is therefore entitled to benefits at the maximum compensation rate of $760.92 per week. Tr. at 14-15. Metropolitan has stipulated that the claimant had average weekly earnings of $1,203.59 in the 52 weeks prior to April 22, 1995, but contends that by the end of that period the claimant had no actual earning capacity. Tr. at 15-16. Thus, Metropolitan contends, the claimant's average weekly wage at the time of his injury was zero.

Under the provisions of section 10 of the Act, an injured worker's average weekly wage should ordinarily be based on the worker's average earnings in the 52 weeks preceding his or her injury. However, exceptions to this general rule are permitted in certain special circumstances, such as when the earnings in the year prior to the worker's injury were artificially reduced by a temporary illness or when there has been significant and permanent increase in the worker's wage earning capacity during the 52 weeks preceding the worker's injury. Le v. Sioux City and New Orleans Terminal Corp., 18 BRBS 175, 177 (1986); Klubniken v. Crescent Wharf and Warehouse Co., 16 BRBS 182 (1984). See also Bonner v. National Steel and Shipbuilding Co., 5 BRBS 290 (1977), aff'd in pertinent part, 600 F.2d 1288 (9th

Cir. 1979); Palacios v. Campbell Industries, 633 F.2d 840, 843 (9th Cir. 1980) (holding that where an injured worker had begun working as a painter shortly before his work-related injury, an administrative law judge was required to reflect in the claimant's average weekly wage calculation such amounts as the claimant might have earned following his injury in his new occupation as a painter).

I find that in this case Metropolitan has failed to provide any convincing reasons for departing from the general rule requiring average weekly wage determinations to be based on the injured worker's earnings in the 52 weeks prior to injury. There are two grounds for this conclusion. First, although Dr. Thomas did opine in February of 1995 that the claimant was unable to work as a longshoreman, there has been no showing that Dr. Thomas had any idea of the physical demands of the claimant's usual job as a forklift driver. Second, the evidence shows that even though there was ample medical justification for the claimant's April 25, 1995 knee surgery, until the day of that surgery the claimant was nonetheless capable of performing his regular job without making any sort of extraordinary effort or receiving any special treatment from his employers.[12] Indeed, the claimant credibly testified that even if the surgery had been delayed for another month, he still would have continued working. CCMX 43 at 203. See also Fox v. West State, Inc., 31 BRBS 118 (1997). Accordingly, I find that the claimant's benefits should be based on his average weekly wage during the 52 weeks prior to April 22, 1995----$1,203.59.

6. Extent of Permanent Partial Disability

Under the provisions of subsections 8(c)(4) and 8(c)(19) of the Act, a worker who suffers the permanent partial loss of use of a leg is entitled to that portion of 288 weeks compensation which is equal to the percentage of the use of the worker's leg that has been lost, even if there is no proof of an actual loss of wage earning capacity. See Henry v. George Hyman Construction Co., 749 F.2d 65 (D.C. Cir. 1984). Conversely, the amount of an injured worker's benefits is limited to the amount specified in subsection 8(c) and may not be increased to reflect additional losses, such as pain or suffering. Young v. Todd Pacific Shipyards Corporation, 17 BRBS 201 (1985). Pain may be relevant, however, in determining the extent to which a claimant has lost the use of a particular body part. See Amato v. Pittson Stevedoring Corp., 6 BRBS 537 (1977). In determining the extent of loss of use of a body part, an administrative law judge may rely on the American Medical Association's Guides to the Evaluation of Permanent Impairment (hereinafter the "AMA Guides"), but is not required to use those guidelines, except in cases involving hearing losses under subsection 8(c)(13) and occupational diseases covered under the provisions of subsection 8(c)(23). Ortega v. Bethlehem Steel Corporation, 7 BRBS 639 (1978). Payment of scheduled disability awards should ordinarily commence on the date the claimant's condition reaches the point of maximum medical improvement. Turney v. Bethlehem Steel Corporation, 17 BRBS 232, 235 (1985).

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[12]In this regard it is noted that there is insufficient evidence to support a conclusion that the claimant's earning capacity materially declined in the final months preceding his surgery. Rather, payroll records indicate that the claimant worked 20 days in February, 17 days in March, and eight days during the first three weeks of April, 1995. CCMX 2 at 25-26. Although the claimant did testify that he had been avoiding some jobs before his knee surgery, the evidence indicates that this avoidance of onerous jobs had been occurring for several years. CCMX 43 at 134, 150, 203-04, 207-08 (claimant's testimony that he began limiting his work activities in the early 1990s). Hence, the claimant's earnings in the 52 weeks prior to April 22, 1995 already reflect his avoidance of jobs that were beyond his capacity.

In this case, the claimant asserts that he has permanently lost 50 percent of the use of each of his legs due to his knee injuries. In contrast, Metropolitan contends that the claimant has lost only 30 percent of the use of each leg. Both of the physicians who have provided opinions concerning the extent of the claimant's permanent disability have based their opinions on the Fourth Edition of the AMA Guides. Under these Guides, there are three possible ratings for patients who have undergone total knee replacement surgery. AMA Guides at 3/85, Table 64. If the results of the surgery are characterized as "good," Table 64 of the Guides specifies a 37 percent lower extremity impairment. If the results are only "fair" there is a 50 percent lower extremity impairment, and if the results are "poor" the lower extremity impairment is 75 percent. Table 66 of the Guides sets forth a point-based scale for determining whether the results of the surgery were "good," "fair," or "poor." Points are assigned for the following factors: Pain, Range of Motion, Stability, Flexion Contracture, Extension Lag, and Alignment. AMA Guides 3/88 at Table 66. When a total of 85 to 100 points are assigned, the surgery results are considered "good," whereas the results are considered "fair" when 50 to 84 points are assigned. AMA Guides 3/85 at Table 64. When fewer than 50 points are assigned, the results are rated as "poor." Id.

The claimant's contention that he has suffered a 50 percent loss of use of each leg is based on the opinion of Dr. Levine. According to Dr. Levine, the results of the claimant's knee surgeries were only "fair" and therefore under the AMA Guides he has suffered a 50 percent loss of use of each of his lower extremities. CCMX 35, Tr. at 92, 97-99, 123-25. Although Dr. Levine's reports and trial testimony do not specifically address every one of the factors contained in Table 66, Dr. Levine's trial testimony does indicate that he assigned only 20 out of a possible 50 points in the Pain category, only 10 out of a possible 25 points for the Stability (laxity) category, and only 20 out of a possible 25 points for the Range of Motion factor. Tr. at 97-99.

Metropolitan's contention that the claimant has suffered only a 30 percent loss of use of his legs is based on the testimony and report of Dr. Greenfield. Tr. at 19-21. According to Dr. Greenfield, his application of the rating factors in Table 66 to the claimant's knees indicated that 45 out of a possible 50 points should be assigned in the Pain category, 25 out of a possible 25 points should be assigned in the Stability category, and 24 out of a possible 25 points should be assigned in the Range of Motion category, thereby producing a total of 94 points. Tr. at 164. Therefore, he testified, under Table 64 the results of the surgeries were "good" and the claimant has suffered no more than a 37 percent loss of use of each lower extremity. Id., CX 22. Although Dr. Greenfield did not testify that these 37 percent ratings should each be reduced to 30 percent under the AMA Guides Combined Values Table, Metropolitan apparently argues that such a reduction is nonetheless required.

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight."[13] Amos v. Director, OWCP, 153 F.3d 1051 (9th Cir. 1998). In fact, in the

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[13]However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" Id.

Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). However, in this case, neither Dr. Williams nor any other treating physician has provided a rating. Although the claimant has suggested that Dr. Levine should be regarded as a treating physician, none of Dr. Levine's reports in any way indicates that he has in fact been treating the claimant. Instead, these reports indicate that Dr. Levine has been merely an examining physician who was retained solely for purposes of litigation.[14] See CX 20, CX 21, CX 25. Hence, neither Dr. Greenfield's rating nor Dr. Levine's rating is entitled to any "special weight."

In evaluating the foregoing ratings, I note initially that Dr. Levine has apparently assigned too few points for the Range of Motion factor. In particular, although Table 66 specifies that one Range-of-Motion point should be assigned for each five degrees of range of motion and Dr. Levine measured the claimant's range of motion as being 125 degrees in each knee, he assigned only 20 out of a possible 25 points in the Range of Motion category. See CCMX 34 (Dr. Levine's February 29, 1996 report indicating that he measured a 125 degree range of motion in each of the claimant's knees). Likewise, Dr. Levine's low (10-point) rating for Stability is inconsistent with the passage in Dr. Levine's February 29, 1996 report describing the claimant's knees as "stable." CCMX 34 at 9. Finally, I also conclude that Dr. Levine's 20 point Pain rating is less consistent with the claimant's descriptions of his post-surgery knee pain than Dr. Greeenfield's 45 point pain rating.[15] See CCMX 34 at 78, 85-86 (report of Dr. Levine indicating that the claimant described occasional "slight" left and right knee pain that progresses to "moderate" pain when engaging in activities such a squatting), CX 22 at 84 (report of Dr. Greenfield indicating that the claimant had "minimal intermittent pain in both knees, becoming slight intermittent pain with prolonged kneeling or attempts to crawl"), Tr. at 76-77 (claimant's testimony that climbing does not "bother" his knees "too much"), CCMX 43 at 174-75 (claimant's testimony that he can go up and down stairs and has no problems stepping off curbs). Accordingly, I find that Dr. Greenfield's 37 percent bilateral disability rating is more convincing than Dr. Levine's 50 percent bilateral rating. However, I disagree with the contention that the Combined Values Chart in the AMA Guides requires each of the 37 percent ratings to be reduced to 30 percent. Although the Chart does indicate that two 37 percent impairments are equivalent to a 60 percent "whole person" impairment, there is nothing in the Combined Values Chart or the AMA Guides that in any way suggests that this or any other "whole person" rating should be divided to reduce the original ratings that were combined by the chart. Indeed, even though it makes sense to make some reductions in individual impairment ratings when calculating a "whole person" rating, it is completely illogical to reduce the impairment rating for one limb simply because there is also an impairment of another limb. See also Tr. at 94 (testimony of Dr. Levine that a "whole person" impairment should not be divided in half to determine the extent of the impairment in each leg).

Accordingly, I find that the claimant is entitled to receive 106.56 weeks of benefits for his right leg impairment and an additional 106.56 weeks of benefits for his left leg impairment. Pursuant to the provisions of subsection 8(c)(22), the foregoing benefits must be paid consecutively, rather than

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[14]For this reason, Dr. Levine's charges are recoverable as litigation expenses under section 28 of the Act, but not as medical expenses under section 7 of the Act.

[15]It is noted in this regard that Table 66 indicates that 45 points should be assigned if a patient experiences only "mild or occasional" pain and that 40 points should be assigned if there is pain only on stairs. If a patient experiences pain both when climbing stairs and walking, 30 points are to be assigned.

concurrently. Such payments first became due on the date the claimant's condition became permanent and stationary: February 29, 1996.

7. Entitlement to Special Fund Relief

Metropolitan seeks Special Fund relief from any award of permanent disability benefits. In order to obtain relief from the Special Fund under subsection 8(f) of the Act an employer must show: (1) that a claimant had a permanent partial disability prior to his or her work-related injury, (2) that the pre-existing disability was manifest prior to that injury, and (3) that the pre-existing disability contributed to the claimant's ultimate permanent disability in the specific manner prescribed in the Act. See Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982).

Although the Director was not represented at the trial, on March 1, 2000 the Director's counsel did submit a pre-trial statement in which he conceded that Metropolitan's application for Special Fund relief was timely and that it met the first two requirements for such relief. However, the statement indicated, the Director does not "approve" of an award of subsection 8(f) relief, apparently because the contribution and responsible employer issues remained unresolved at the time Metropolitan's application was filed. Since the responsible employer issue has been resolved, the only remaining issue is whether the claimant's pre-existing disability contributed to his ultimate permanent disability in the manner required under subsection 8(f).

It is well established that there are two aspects to the contribution requirement. First, the employer must establish that the claimant's ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is either partial or total. 20 C.F.R. §702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, subsection 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. FMC Corp. v. Director, OWCP, 886 F.2d 1185 (9th Cir. 1989); Director, OWCP v. Luccitelli, 964 F.2d 1303 (2nd Cir. 1992); Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748 (5th Cir. 1990). Second, when an ultimate permanent disability is only partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. §702.321(a)(1). In order to determine whether this requirement has been satisfied, a fact finder must consider what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of the injury. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 8 F.3d 175, 185 (4th Cir. 1993). In this case it is absolutely clear from the medical evidence that neither the claimant's left nor right knee disabilities are due solely to his April 22, 1995 injury. As well, it is also absolutely clear that the claimant's pre-existing left and right knee disabilities caused the April 22, 1995 injury to result in materially and substantially greater disabilities. Accordingly, I conclude that the evidence is sufficient to show that all three of the subsection 8(f) contribution requirements have been fully satisfied for the disability in each of the claimant's knees.

In cases where a claimant has multiple or successive disabilities, the extent of an employer's entitlement to subsection 8(f) relief depends upon the number of separate injuries suffered by the claimant. For example, in Murphy v. Pro-Football, Inc., 24 BRBS 187 (1991), the Benefits Review Board (BRB) held that when a single injury results in successive periods of permanent disability, an employer who has established entitlement to subsection 8(f) relief is required to pay only 104 weeks of

permanent disability benefits.[16] In contrast, however, the BRB has also held that when multiple disabilities arise from completely separate injuries, an employer who is otherwise entitled to subsection 8(f) relief is not relieved of liability after paying only 104 weeks of permanent disability benefits and must instead pay the amounts specified in subsection 8(f) for each separate injury before the Special Fund assumes any liability. Cooper v. Newport News Shipbuilding and Dry Dock Co., 18 BRBS 284 (1986). This distinction has been explicitly affirmed by at least one appellate court. Newport News Shipbuilding and Dry Dock Company v. Howard, 904 F.2d 206 (4th Cir. 1990).

In this case, Metropolitan alleges that its liability for benefits should be limited to 104 weeks, but neither Metropolitan nor the Director has submitted any argument on the question of whether the claimant's knee impairments are the result of a single injury or multiple injuries. Moreover, there are apparently no reported decisions by the Benefits Review Board determining whether there has been more than one injury when impairments to two separate body parts simultaneously result from the same work-related activity.[17] However, the Fourth Circuit's Howard decision does indicate that in the opinion of the Fourth Circuit multiple impairments which simultaneously result from the same cause should be attributed to a single injury. See 904 F.2d 211 (statement observing that if the back injury and carpal tunnel syndrome that had disabled the claimant in that case had occurred "simultaneously," the claimant's employer would have been liable for only 104 weeks of permanent disability benefits). In this case, the claimant's knee impairments indisputably occurred simultaneously and as the result of the same work activity. Accordingly, I find that the claimant's knee impairments are due to a single injury and therefore further conclude that Metropolitan should not be required to pay more than 104 weeks of permanent partial disability benefits.[18]

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[16] See also Henry v. George Hyman Construction Co., 21 BRBS 329 (1988), and Bingham v. General Dynamics Corp., 20 BRBS 198 (1988)(holding that where there are successive awards for permanent disability and death, an employer who is entitled to subsection 8(f) relief must pay only 104 weeks of benefits if both awards arise from the same injury).

[17]It is noted in this regard that the Benefits Review Board has recently issued a decision holding that when there has been a single injury which has caused a worker to become entitled to concurrently receive benefits for both a scheduled disability and an unscheduled disability, an employer seeking subsection 8(f) relief must establish all of the elements of entitlement to such relief for each separate disability. See Padilla v. San Pedro Boat Works, ___ BRBS___ (May 17, 2000, BRB No. 99-862) slip opinion at 7-10. Such entitlement was not established by the employer in that case and therefore the BRB's decision did not indicate whether the successful establishment of all of the elements of entitlement for both types of disabilities would have limited the employer's liability to only one 104 week period. However, in other cases where the BRB has required employers to show entitlement to subsection 8(f) relief for each type of benefit awarded (e.g., in cases involving claims for both permanent disability and death benefits), the Board has nonetheless held that an employer is liable for only one 104-week period if the entitlement to the different types of benefits "arose from the same injury." See Fineman v. Newport News Shipbuilding and Dry Dock Co., 27 BRBS 104, 109-10(1993); Henry v. George Hyman Construction Co., 21 BRBS 329, 331 (1988).

[18]In this regard it is noted that subsection 2(2) of the Longshore Act defines the term "injury" to be an "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or

8. Period of Total Temporary Disability

It is clear from the medical evidence that as a result of the claimant's knee surgery, he was totally temporarily disabled from at least the date of the surgery (April 24, 1995) until November 5, 1995. Metropolitan does not dispute the November 5, 1995 termination date, but has declined to join in a stipulation that the period of temporary total disability commenced on the date of the claimant's April 24, 1995 surgery. Instead, Metropolitan apparently argues that the claimant's total temporary disability commenced at some earlier date. I find this argument to be contrary to the weight of the evidence. Accordingly, I find that the claimant was totally temporarily disabled from April 24, 1995 through November 5, 1995.

ORDER

1. Metropolitan shall pay the claimant compensation for temporary total disability for the period between April 24, 1995 and November 5, 1995, inclusive, at a compensation rate of $760.92.

2. Beginning on February 29, 1996 and for the following 104 weeks, Metropolitan shall pay the claimant permanent partial disability benefits for the partial loss of use of his legs at a compensation rate of $760.92 per week.

3. Beginning 104 weeks from February 29, 1996 and for the next 109.12 weeks, the Special Fund shall pay the claimant permanent partial disability benefits at a compensation rate of $760.92 per week.

4. Metropolitan shall provide the claimant all medical care that may in the future be reasonable and necessary for the treatment of his knee injuries.

5. Metropolitan and the Special Fund shall pay interest on each unpaid installment of compensation from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. §1961.

6. The District Director shall make all calculations necessary to carry out this order.

7. Within 30 days after this Decision and Order <u>becomes final</u>, counsel for the claimant shall submit a fully supported <u>and updated</u> application for costs and fees to the undersigned administrative law judge and to counsel for Metropolitan. Within 15 days thereafter, counsel for Metropolitan shall provide

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<u>unavoidably results from such accidental injury</u>...." (emphasis added). I interpret this language to mean that even if a worker suffers impairments in more than one body part, the impairments are still the result of a single injury if the impairments directly or indirectly resulted from a single "accidental injury" or "occupational disease." Thus, for example, if an accidental injury to <u>one</u> of a worker's ankles indirectly caused impairments in <u>both</u> of the worker's legs, there would still be only one injury because both impairments "naturally or unavoidably" resulted from a single accident.

the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with counsel for Metropolitan. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Metropolitan. Counsel for Metropolitan shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by this administrative law judge.

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Paul A. Mapes
Administrative Law Judge

Date_____